

86-727

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Supreme Court, U.S.
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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

TERM:

ROBERT WESLEY DERVISHIAN

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

PETITION FOR WRIT OF CERTIORARI
To Supreme Court of Virginia

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Richmond, Virginia 23220
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631/P



QUESTIONS PRESENTED

I

Whether the conviction of a defendant lacks due process of law when the court and/or government interferes with the defendant's right to gather evidence, call for witnesses, or prepare for trial.

II

Whether the conviction of a defendant lacks due process of law when the court and/or government is not neutral and detached and interferes with the right to defend.

III

Whether the evidence is constitutionally insufficient to support a conviction when it is based upon the impeached testimony of a sole witness.

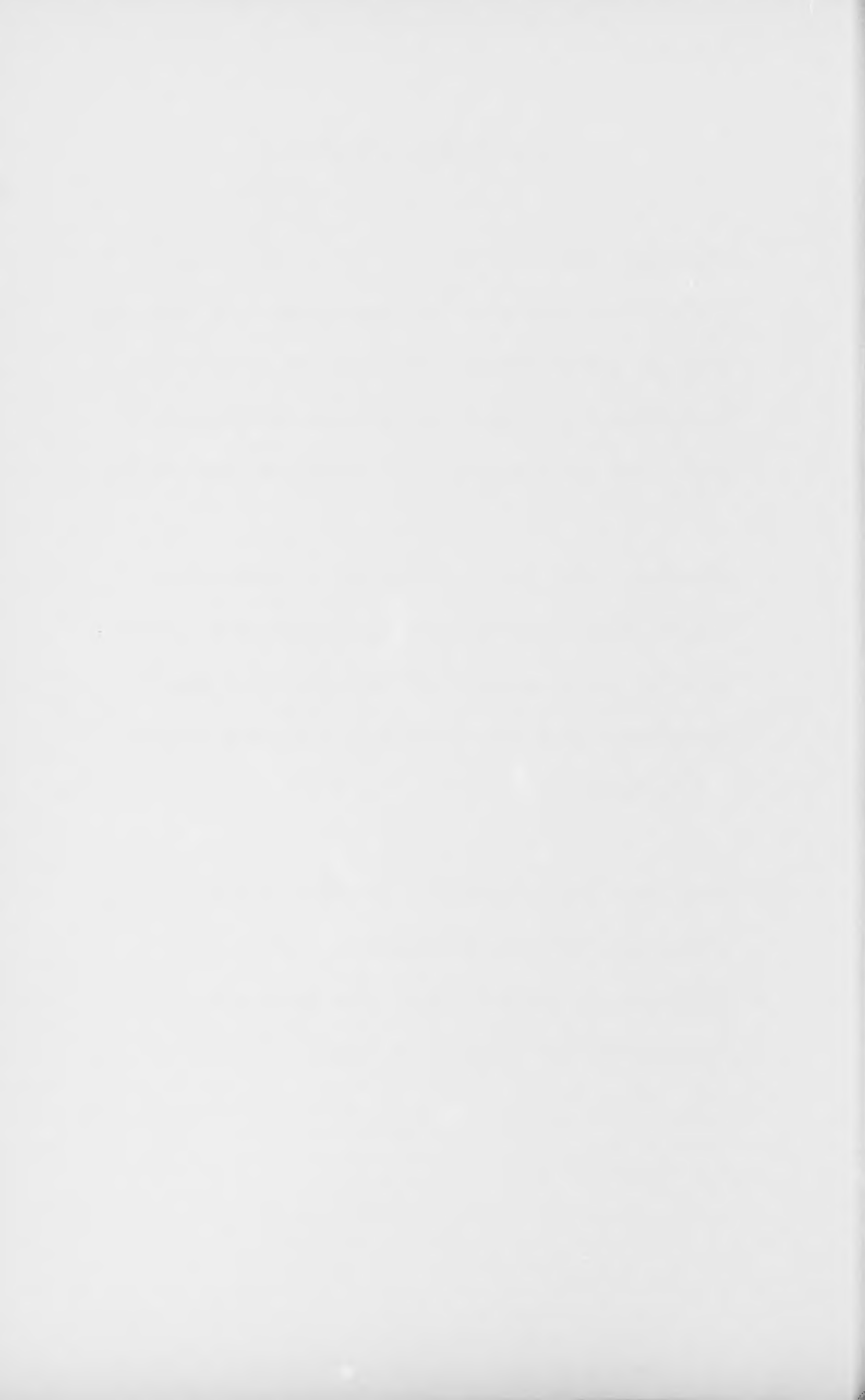


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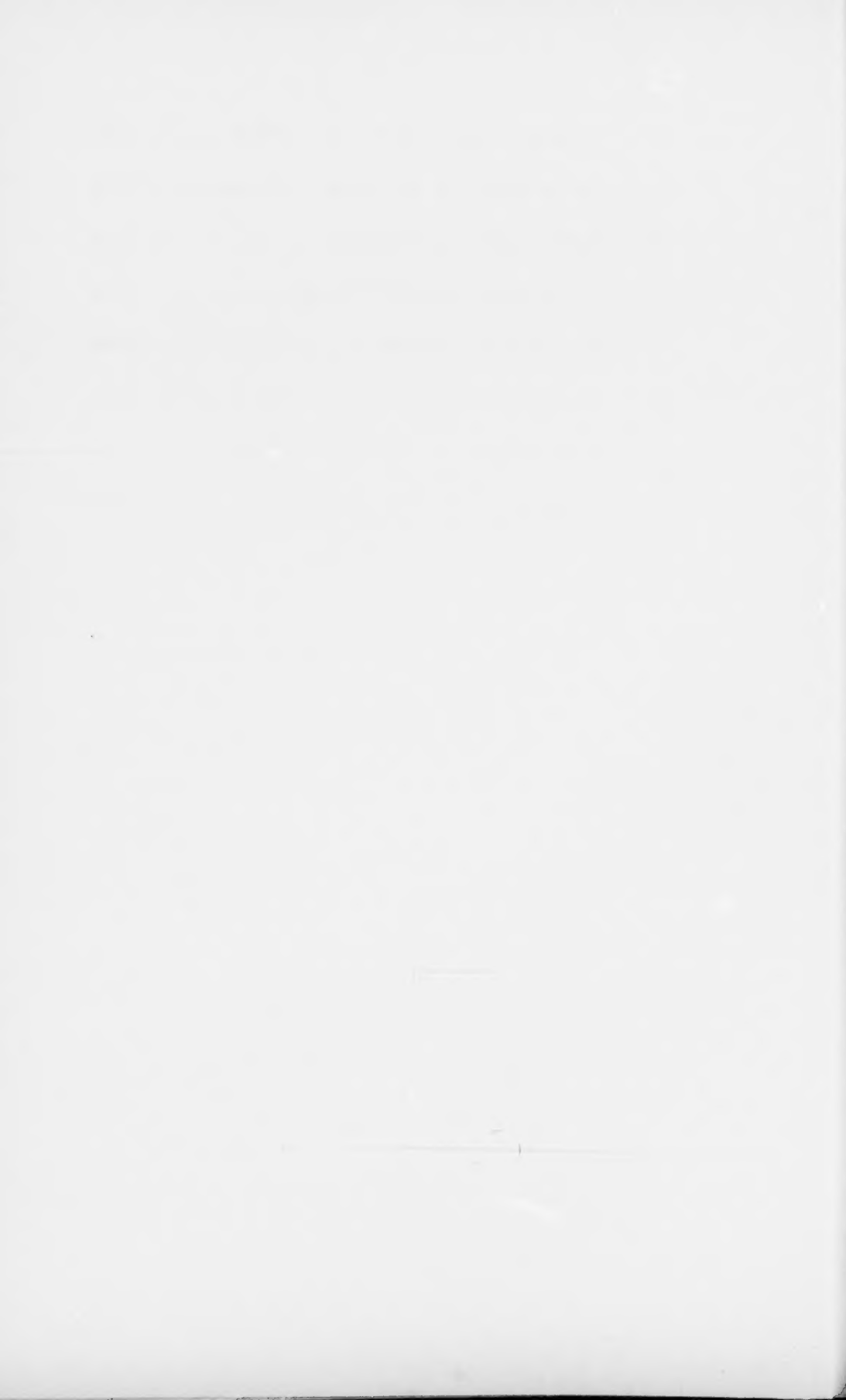


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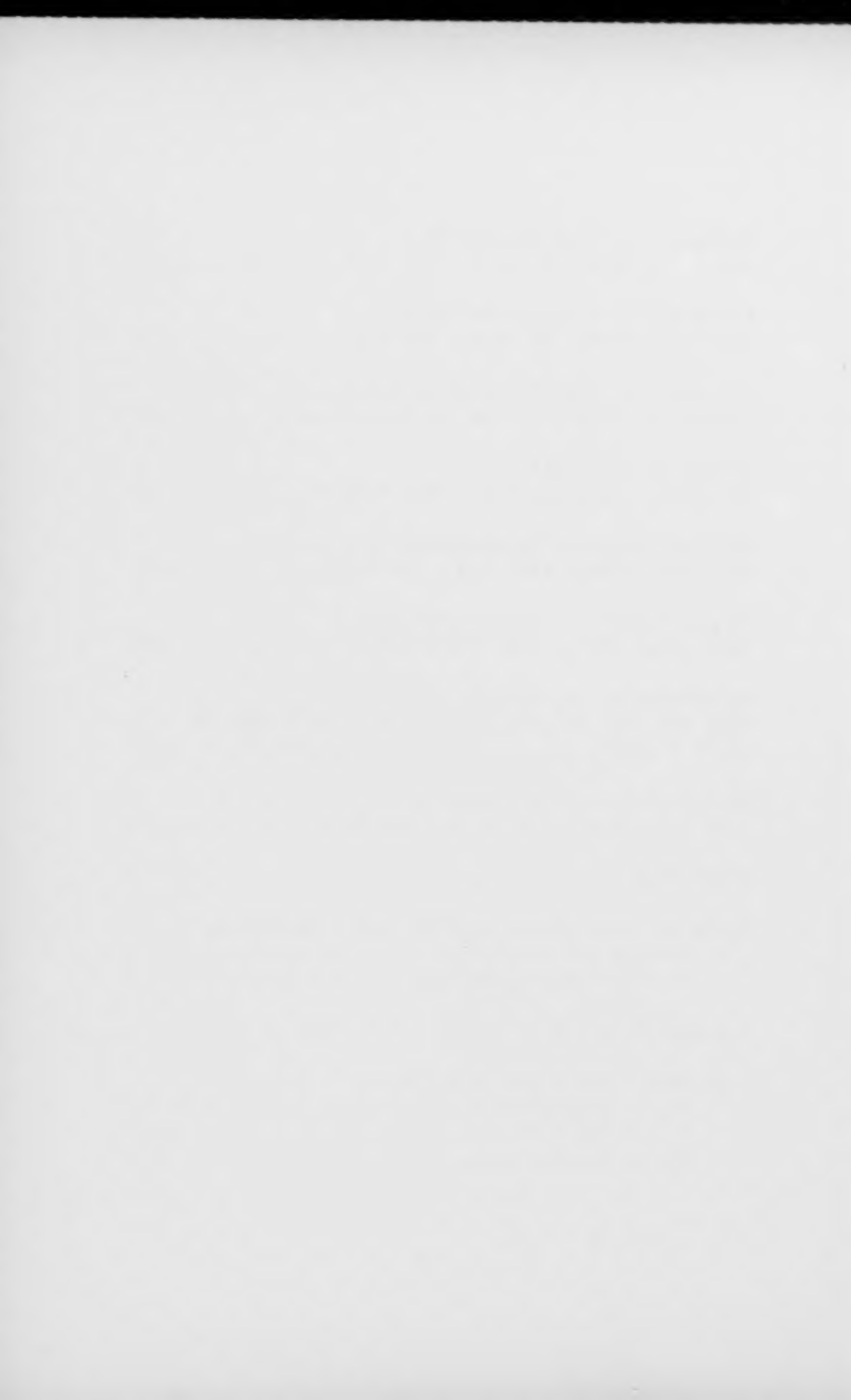
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CASE NO.
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vs.

COMMONWEALTH OF VIRGINIA

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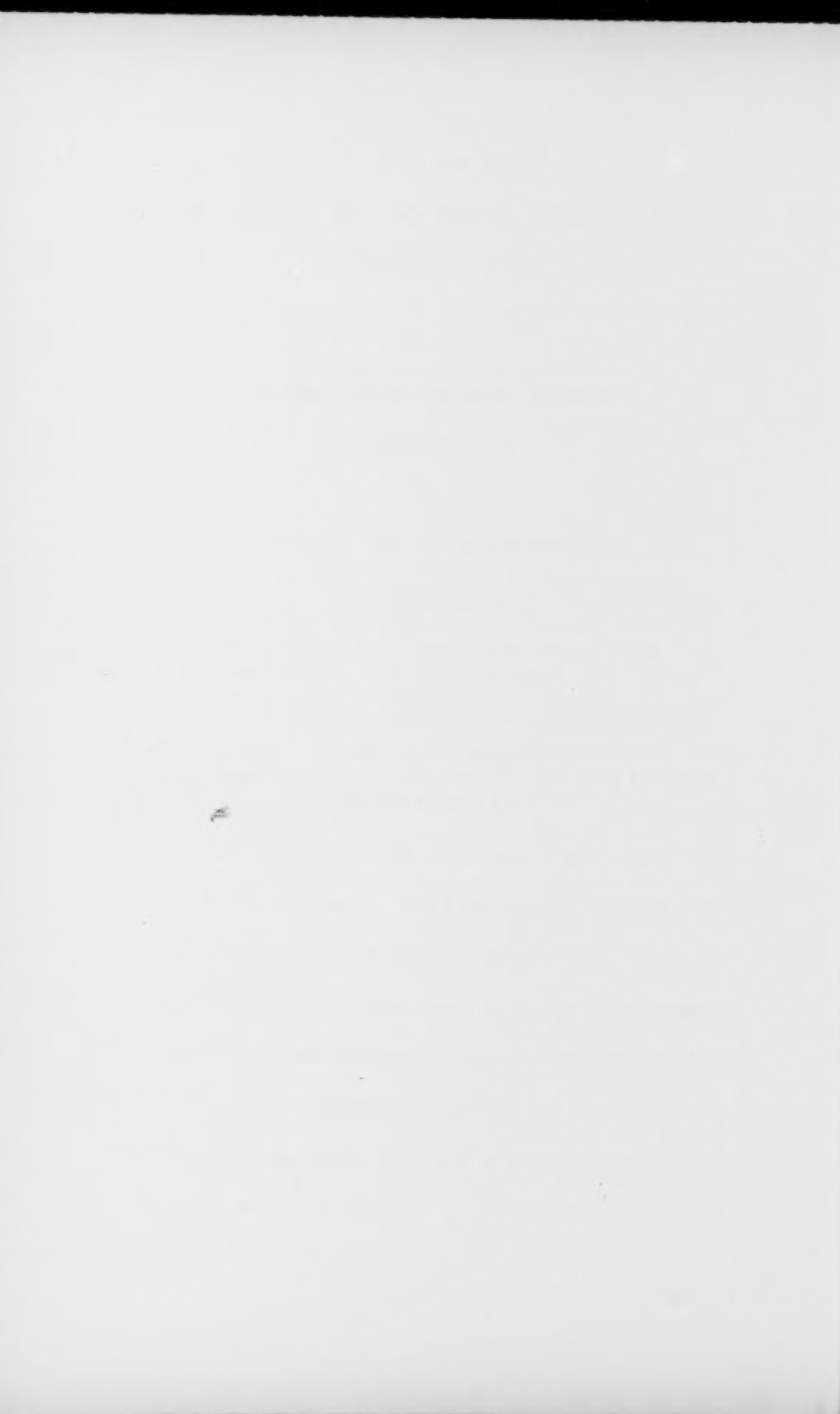
PETITION FOR WRIT OF CERTIORARI
To The Supreme Court Of Virginia

TO: The Honorable, The Chief Justice And
Associate Justices Of The Supreme Court
Of The United States:

Your Petitioner, Robert Wesley
Dervishian, respectfully prays that a
Writ of Certiorari issue to review the
judgement of the Supreme Court of Virginia
which became final, September 5, 1986.

OPINION BELOW

The Opinions of the Supreme Court of
Virginia (Appendix 1) and of the Court



of Appeals of Virginia (Appendix 2) is unreported.

JURISDICTION

The Petition for Rehearing was denied by the Supreme Court of Virginia on September 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the Fifth Amendment to the United States Constitution which provides, in relevant part:

"[N]or shall [any person] be deprived of life, liberty or property, without due process of law..."

and the Fourteenth Amendment to the United States Constitution, in part,

"[N]or shall any State deprive any person of life, liberty, or property without due process of law."

and the Sixth Amendment to the United States Constitution, in part:



"In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

During the evening of Memorial Day, at approximately 2:00 a.m., on May 31, 1984, when Robert Wesley Dervishian, your petitioner, parked his car at his law office, he was charged with violations of the Code of Virginia 18.2-266 (Driving under the influence of alcoholic beverages, second offense) and 18.2-268 (Refusal to submit to the taking of a blood or breath test to determine alcoholic content).

MATERIAL PROCEEDINGS BELOW

On July 20, 1984, this matter was heard in the General District Court of the City of Richmond, Virginia, and

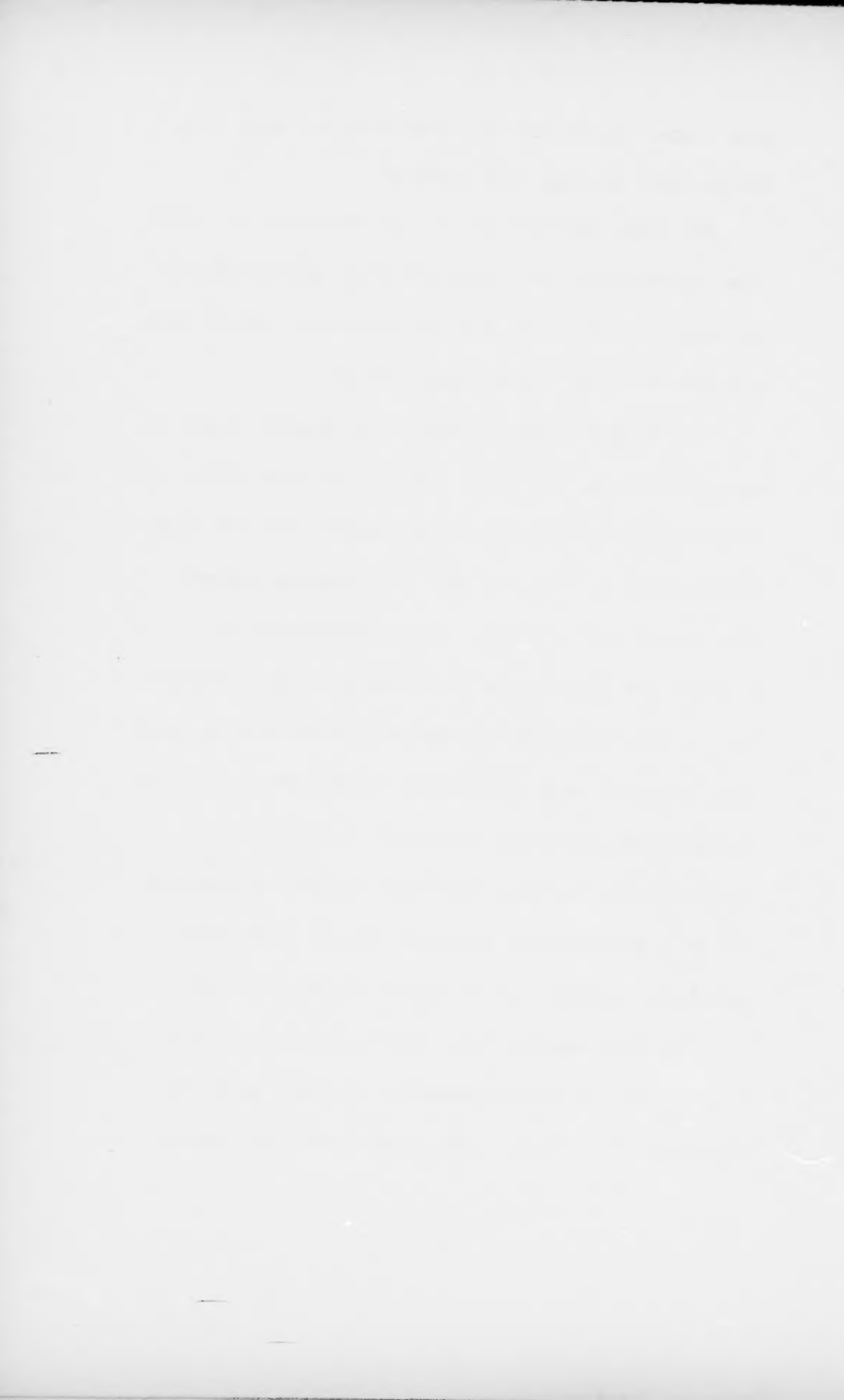


was tape recorded by the clerk, and the defendant noted his appeal.

At the docket call, on August 6, 1984 the defendant was denied the opportunity to set his motion for witnesses names and access to the tape recording.

On August 20, 1984, the appeal was heard in the Circuit Court of the City of Richmond, Virginia, the Court denied the defendant's motion for witnesses names and tape recording, the Commonwealth presented its case and rested; on August 24, 1984, denied defendant's motions, and was argued and objected (Appendix 6), and Judgement entered without additional testimony, (also, Refusal Case, Appendix 7) and suspended execution of Judgement pending appeal with bond at \$1,500.00.

On September 12, 1984, the Circuit Court set the judgements aside, and on October 9, 1984, admitted into evidence



the transcript of the District Court trial as Defendant's Exhibit #1 and reinstated Judgements of conviction, and suspended execution of judgement pending appeal and renewed the bond. (Appendix E)

On June 3, 1985, the Court of Appeals of Virginia entered an order denying the Petition for Writ of Error, (and on June 12, 1984, Judge Wilkinson issued a Capias and on June 17, 1984, threatened to incarcerate the defendant).

On June 28, 1985, the Court of Appeals of Virginia entered an Order finding that its order of June 3, 1985 was forwarded to the Circuit Court prematurely, and on September 26, 1985, denied the Petition for Rehearing.

The Supreme Court of Virginia entered an Order; on July 24, 1986 denying the Petition for Writ of Error; on September 5, 1986 denying the Petition for Rehear-



ing; and on September 11, 1986, deferring the issuance of it's Mandate.

FACTS

On May 31, 1984, while being followed by a police officer, the defendant drove down Sheppard Street the wrong way for one block to Grove Ave. and then drove six blocks (2 on Grove and 4 on Boulevard) to the corner of Boulevard and Park Ave. (Appendix B, P.13,L.1-11) where he stopped for a red light (Appendix B, P.11,L.17-23) then he proceeded to turn left through the red light and park his automobile at the corner on Patterson Ave., cut off his engine and lights (Appendix B, P.7, L.13-15) and got out to go into his law office. (Appendix B, P.12, L.21-23).

The police officer pulled up behind the defendant and got out of his vehicle, asked the defendant for his drivers



license and registration card (Appendix B, P. 7, L. 13 - 16)

"... noticed an odor of alcohol."

(Appendix A, P. 9, L. 7), asked the defendant to walk heel- to-toe and the defendant agreed and started walking (Appendix B, P.9, L.19-23), "when he turned around he stumbled" (Appendix B, P.7,L.23) "... grabbed hold of the wall" (Appendix B, P.7,L.22-25) "...straightened up and he walked up to me and said I refuse anything further." (Appendix B, P.9,L.22-23) "The only statement he made to me was that he was not intoxicated and refused to answer any questions" (Appendix A P.11,L.4-5) the defendants "... speech was slow, but I could understand him, it was not slurred" (Appendix A,P.11,L.10) "his eyes were glassy" (Appendix A, P.9,L.10). The defendant was arrested at 2:40 a.m. and released at 6:00 a.m. along



with two persons (Appendix B, P.14 & 15).

I

THE CONVICTION OF A DEFENDANT
LACKS DUE PROCESS OF LAW WHEN
THE COURT AND/OR GOVERNMENT
INTERFERES WITH THE DEFENDANT'S
RIGHT TO GATHER EVIDENCE,
CALL FOR WITNESSES, OR
PREPARE FOR TRIAL.

On July 20, 1984, at trial, in the General District Court of the City of Richmond, Virginia, the Honorable Henry M Schrieberg, Judge, declared "x x x you don't have to have any constitutional rights x x x" and denied the defendant's motion to produce the names of the two persons released with the defendant, who could have been proof of his innocence. Then, denied the defendant's Motions to Strike and Dismiss, and the Court asserted that the element of the crime (prior offense) had been "alleged" (over the defendant's objection) excusing the fact that it had not been proved by the

Commonwealth, thereby dispensing with proof by evidence as required by the Constitution of the United States and resorted to some other standard, entered Judgement. At that time, the defendant perfected his appeal and the Court denied his motion for access to the Court's tape recording of the proceedings, and during the week of July 30, 1984, the Court also interfered in the Clerk's office when the defendant requested access to the "public record" to-wit: names and tape recording.

As a result, the defendant was not able to gain access until after he was convicted on the appeal, because the Honorable James B. Wilkinson acted in concert with the General District Court.

On August 6, 1984, Judge Wilkinson denied the request to set the motions for access prior to trial, and on August 20, 1984, at trial, he denied defendant's



said motions, and August 24, 1984, rushed to conviction, and September 12, 1984, he set it aside, and October 9, 1984, reinstated them, admitting Defendants Exhibit #1, (District transcript), in an ineffective attempt to cure the reversible error.

Accordingly, your petitioner stood trial, without the benefit of witnesses names or addresses, then, in the control and possession of the Commonwealth, without the benefit of their testimony, and without the opportunity to prepare for trial, and to impeach, all of which lacked due process of law. U.S. Constitution, 5th, 14th, and 6th Amendments, Holt v. City of Richmond, 204 Va 364, 131 S.E. 2d 394.

Regarding access to "public records", tape recording and witnesses names:

"Every person is entitled to the inspection ... of public records, including ... judicial record, provided he has an interest there-



in which is such as would enable him to maintain or defend an action for which the ... record sought can furnish evidence or necessary information." 175 ALR 1262, 45 Am Jur 427, Records and Recording Laws

With regard to denial of witnesses:

"Article I, Section 8, of the Virginia Constitution [and the VI Amendment, of the United States Constitution] provides: 'That in criminal prosecutions a man hath a right ... to call for evidence in his favor, ... He shall not be deprived of life or liberty, except by the law of the land or the judgement of his peers; ...' Winston v. Commonwealth, 188 Va 386 49 S.E.2d 611

"It is true that the constitutional guaranty of the right of an accused 'to call for evidence in his favor' 'includes the right to prepare for trial which in turn, includes the right to interview material witnesses and to ascertain the truth." Bobo v. Commonwealth, 187 Va. 774, 48 S.E.2d 213

In Anthony v. Commonwealth, 179 Va 303 18 S.E.2d 897, the Court determined that an accused should not be forced into trial in the absence of material witnesses.

Your petitioner had an absolute right



to call witnesses on his behalf.

In holding that the right to compulsory process guaranteed by the Sixth Amendment to the U.S. Constitution was applicable to the states through the due process clause of the Fourteenth Amendment, the U.S. Supreme Court stated that:

"The right to offer the testimony of witnesses, and compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas* 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L. Ed 2d 1019 (1967)

The parallel conclusion has been reached by the Virginia Supreme Court. In *Gilchrist v. Commonwealth*, Va. , 317 S.E.2d 784 (1984).

And, the court has found the same right under Article I, Section 8 of the Constitution of Virginia. *Cox v. Common-*

wealth, 227 Va. 324, 328, 315 S.E. 2d 228.

In the past, the true character of the judicial system in the Commonwealth of Virginia as it bears upon the average citizen has been hidden from your review under the curtain or veil of trial "de novo" behind which the Commonwealth and/or Court has effectively denied rights and paved the way for the "streamlined" procedures in these trial courts. The veil is drawn so tight, that the District Court Judge arrogantly tape recorded his gross abuses of the Constitution, apparently believing that it was safe from view. This type of Judicial conduct is so destructive of the System of Justice in this Commonwealth, it could explain,

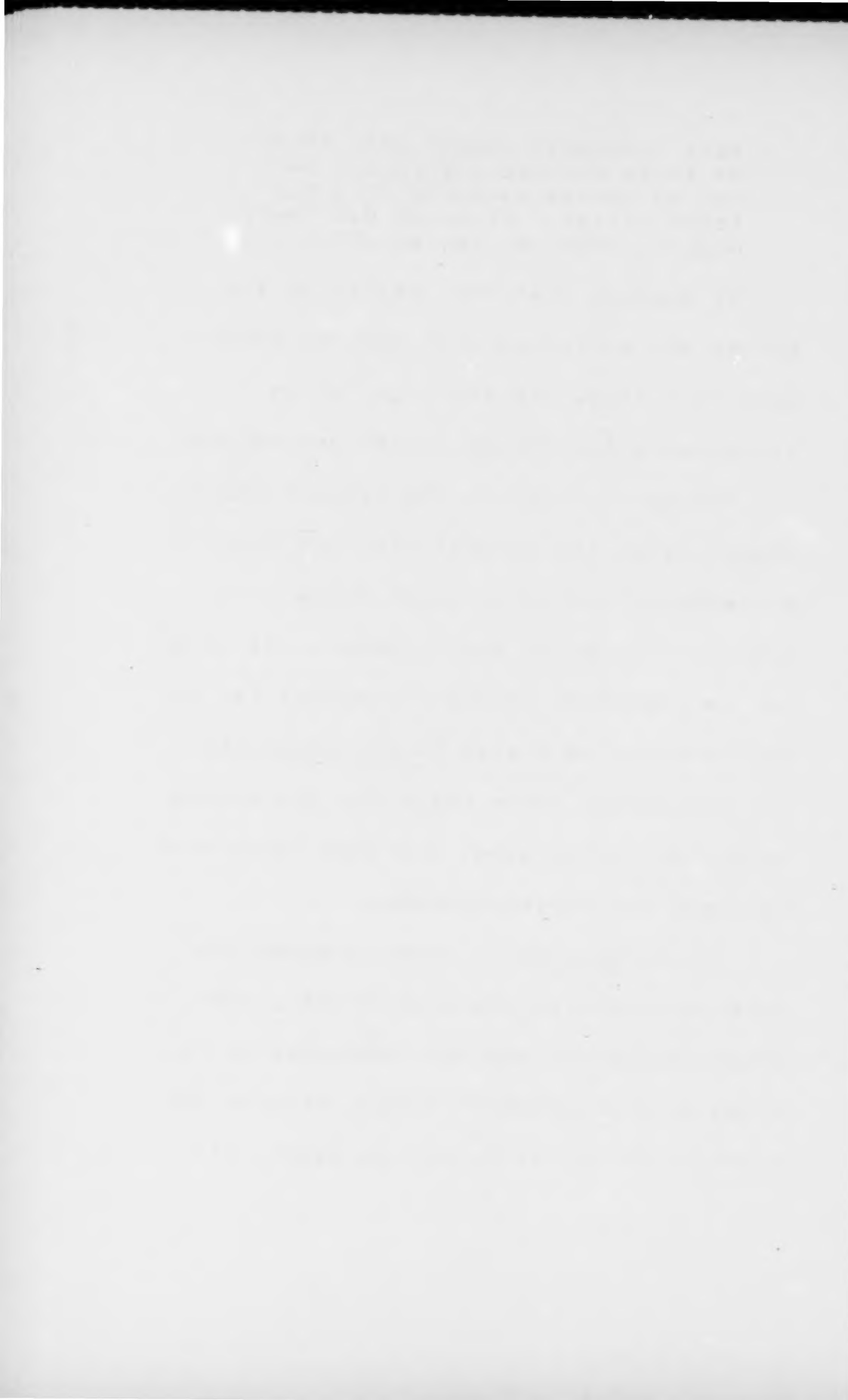
"... a national survey conducted by the Hearst Corporation on the country's judicial system. Some of the results were shocking to say the least. For example, exactly 50% of those surveyed believed that a person accused of a crime must prove himself or her-

self innocent. Worst yet, 49.9% of those who had previously served on juries harbored this mistaken belief." Virginia Bar News, August, 1984, P. 16, at 17)

It appears that the results of the survey are explained when the "De Novo" veil is lifted, and the light of it illuminates the "trial court" procedures.

"De Novo" trial in the Circuit Court always hides the General District Court proceedings and it is never subject to judicial review by any tribunal. It is a per se violation of due process of law in that the United States Constitution and its Amendments never reach the proceeding to protect an accused, and your Petitioner has been prejudiced thereby.

The Circuit Court never granted the defendants motion (Rule 3A:12[b]), even after retrieval, and the Commonwealth reniged on the agreement (prior offense for transcript) by its Motion to Quash, all



pre-empting the calling of witnesses and presentation of the defendants evidence.

There was a time "... when by the common law of England, no witnesses would be adduced on the part of the prisoner, to manifest his innocence, for he could then make no preparation for his defense. One cannot read without horror and astonishment, the abominable maxims of law, which deprived persons accused, and on trial for crimes, of the assistance of counsel, except as to points of law, and the advantage of witnesses to exculpate themselves from the charge. It seems by the ancient practice, than whenever a person was accused of a crime, every expedient was adopted to convict him and every privilege denied him, to prove his innocence. ... It is manifest that there is as much necessity ... to investigate matters of fact, as points of law, if truth is to be discovered. ... every person when he is accused of a crime, is entitled to every possible privilege in making his defense, and manifesting his innocence, by the instrumentality of counsel, and the testimony of witnesses." State v. Krozel, 24 Conn. Sup. 266, 190 A2d 61.

One does not have to be learned in the law to recognize that the "ancient practices" are the current procedures in

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the Courts of the Commonwealth.

The Court's denial of the defendant's motion for access to tape recording and to witnesses was as harsh an action as the court could take, forever preventing the fair cross-examination of the accuser and due process of law in this case.

Admitting the transcript into evidence after-the-fact does not cure the Court's prejudicial error, and is not a substitute for fair cross-examination of a witness.

II

THE CONVICTION OF A DEFENDANT
LACKS DUE PROCESS OF LAW WHEN
THE COURT AND/OR GOVERNMENT IS
NOT NEUTRAL AND DETACHED AND
INTERFERES WITH THE RIGHT TO DEFEND

From the onset, when Judge Schrieberg declared "X X X you don't have to have any constitutional rights X X X" all these proceedings have lacked the due process of law of a neutral and detached judicial role as the court and/or government



acted with a design to discourage and prevent the Petitioner from defending.

The method of choice by the General District Court Judge was by the use of the facade of "stipulation". (Appendix A, p. 3, l. 16-18, p. 6, l. 21-23)

The method of choice by the Circuit Court Judge was to ignore the motions for witnesses' names and the defendant's access to the tape recording of the General District Court proceedings until the Court (Circuit) was forced to do so. (Appendix B, p. 5, l. 16-19)

The shocking truth is that the Court moved from it's traditional neutral and detached role as an 'unbiased tribunal' to the posture of 'adversary'.

Evidence of the hand (General District Court) in glove (Circuit Court) effort by the Court to interfere with defendant's exercise of his right to

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defend himself exists on the record when the Circuit Court Judge acknowledged that he had been communicating with the General District Court Judge and thwarted the subpoena duces tecum that he should have ordered prior to trial. (Appendix D, p. 2, l. 13-25, p. 3, l. 1-3)

The court has acted with a design to discourage or stop your Petitioner from the exercise of his right to defend himself, at trial and on appeal, by:

- (1) Denial of motion for access to tape recording and witnesses.
- (2) Actively interfering with access to the "public record".
- (3) Denial of request to set Motion for access for hearing prior to trial.
- (4) Failure to grant Motion for Supoena Duces Tecum.
- (5) Retrieval of names and tape recording after delivery to Circuit Court Clerk.



(6) Breach of agreement of Commonwealth by filing its Motion to Quash Subpoena.

(7) Misplacement of Notices of Appeal.

(8) Compiling one record, contrary to the defendant's request for separate records.

(9) Misinformation about record transmittal, and failure to give notice pursuant to Rule 5A:8(b), disrupting the the preparation of the statement of facts and incidents of hearing of 8/24/84.

(10) Increasing the incidence and threat of punishment; (A) increase from fine and license suspension 7/20/84, to jail, fine, and license suspension on appeal in Circuit Court 8/20/84; (B) increase from suspension of execution of judgement on 8/24/84 to suspension of jail sentence only on 10/9/84 after Defendant's Exhibit (transcript) made part of the record; (C) premature reporting to DMV of Virginia, and Judge Wilkinson's bailiff taking

possession of defendant's drivers license
2/28/85; (D) threat of incarceration
6/17/85 pursuant to capias of 6/12/85.

(11) Scheduling of argument at a distant
location by the Court of Appeals (during
defendant's disability of revocation of
driving privileges by the trial Court) at
Arlington, Virginia, on a legal holiday
(5/1/85, Law Day), at 9:00 a.m. for
fifteen minutes, one hundred miles from
(Richmond) the seat of the Court of
Appeals and residence of the defendant.

(12) Transmittal of an unauthorized copy
of the Appeals Court order of June 3,
1985 denying Petition for Writ of Error.

(13) Issuance of Capias by Circuit Court
on June 13, 1985 threatening petitioner's
personal liberty, and requiring the pre-
paration of special motions, by interpret-
the "premature copy" as a "Mandate".

All of these acts and omissions by

the court and/or government are inconsistent with a neutral and detached role and due process of law as embraced by *Augilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 also see, *Holt v. City of Richmond*, 204 Va 364, 131 S.E. 2d 394, *McHone v. Commonwealth*, 190 Va at 444, 57 S.E. 2d at 114, *Durrette v. Commonwealth*, 201 Va at 742, 113 S.E. 2d at 847.

Your petitioner was not forthwith carried before a magistrate and was prejudiced by the denial of his right to gather private and independent medical evidence of his physical condition to prove his sobriety within a reasonable time in relation to the arrest at 2:00 a.m. He was released at 6:00 a.m.

Refusal of a blood test is consistent with the exercise of his constitutional right to remain silent, which he asserted by his statement "he was not intoxicated



and refused to answer any questions", and has not testified, none of which should inhibit his right to gather private and independant evidence on his behalf, which the Circuit Court Judge stated on on the one hand (Appendix B, p. 14-15) and on the other hand denied (Rule 3A:12b) by not granting the defendant's Motion for access. Holt v. City of Richmond, 204 Va. 364, 131 S.E. 2d 394.

III

THE EVIDENCE IS
CONSTITUTIONALLY INSUFFICIENT
TO SUPPORT A CONVICTION WHEN
IT IS BASED UPON THE IMPEACHED
TESTIMONY OF A SOLE WITNESS.

The Commonwealth's only witness testified in the trial in the General District Court that "The only statement he made to me was that he was not intoxicated and refused to answer any questions." The Commonwealth's witness thereafter changed his testimony in the

Circuit Court to cure the defect in the testimony given in the District Court. (Appendix A, p. 11, l. 4)

In the Circuit Court, the Commonwealth's only witness testified that the defendant made a statement to him that "he had a few drinks" (App. B, P.8,L.19) directly contradicting his testimony in the General District Court.

It is not appropriate for the trial Court to accept the impeached testimony of Police Officer Ramirez as a basis for conviction. Here, the sole Commonwealth witness is asserting a material fact that is a direct contradiction to his prior testimony in the General District Court.

The record is void of the necessary element of the alleged crime.

It is precise to say that the Commonwealth's evidence is contradicted and is in conflict on the essential



element of the alleged crime. When the transcript of the District Court trial was admitted into evidence on October 9, 1984, by the Circuit Court as Defendant's Exhibit #1 (Appendix E, P.10,L.4-6), for the purpose of impeachment of the Commonwealth's only witness (Appendix E, p. 6, l. 14-16), it became original evidence.

"... the stipulation of the parties made it original evidence the effect of which was not destroyed by any contradictions made by the witness on the present trial. Such contradictions merely raised an issue of fact." *Priolo v. Southard*, 198 N.Y. 528, 91 NE 275.

"The general rule of 'judicial estoppel' or 'estoppel by oath' is stated in 19 Amer.Jur. 712 ... a person may not, to the prejudice of another person deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained.

* * *

Ordinarily, when a person contradicts his prior testimony because it appears to be to his advantage to do so, the veracity of such witness may become so questionable

that it may require strong and convincing corroborative evidence to induce a court or jury to believe his subsequent declarations. Tracy Loan v. Openshaw Inv., 102 Utah 509, 132 P.2d 338.

"Any discrepancy in the testimony of a witness testifying on different trial of a cause should be resolved to favor of the earlier testimony; the transaction then being fresher in his mind. Adams Express v. Ten Winkel, 44 Colo. 59, 96 P.2d 818.

The Commonwealth's only witness had ample opportunity in the two trial to directly associate the "odor of alcohol" with the defendant, but failed to do it.

During the District Court trial the Commonwealth's Attorney (Breit) asked him the precise question:

Q "Did you ask him any questions about where he had been and where he was going and had been drinking?" (Appendix A, P. 11, L. 2-3) (Appendix L, Objection to Transcript)

A. "The only statement he made to me was that he was not intoxicated and refused to answer any questions." (Appendix A, P. 11, L.4-5)

Even when the only witness changed his testimony in an attempt to establish an alleged admission against interest, he made no reference to alcohol. There is simply no evidence associating the accused with alcohol. The record is void.

The Commonwealth's only witness did not testify that he smelled any alcohol on the accused's person, or on the accused's clothes, or on the accused's breath, or at any place except when he was near the accused's automobile.

"... there can be no controversy that the conviction of this defendant rested solely upon the testimony of said state witness ... and that in the absence of his testimony the duty would have rested upon the court to direct a verdict in favor of the defendant and to order his discharge. ... This being true, ... the jury are not authorized to find the defendant guilty on the evidence of a witness, upon whose testimony of guilt depends, if they have a reasonable doubt of the truth of his statements." *Gilbert v. State*, 20 Ala. App. 565, 104 So. 45.



"... the accused may ... rely upon the circumstances of extenuation appearing in the evidence produced by the Commonwealth with the same effect as if brought out in evidence offered by him." *Jacobs v. Commonwealth*, 132 Va. 681, 111 S.E. 90, *Bradshaw v. Commonwealth* 174 Va. 391, 4 S.E.2d 752.

"... circumstances of suspicion, no matter how grave or strong, are not proof of guilt sufficient to support a verdict of guilty. The actual commission of the crime by the accused must be shown by evidence beyond a reasonable doubt to sustain his conviction." *Powers v. Commonwealth*, 182 Va. 669, 676, 30 S.E.2d 22, 25, *Clodfelter v. Commonwealth* 218 Va. 619

Your Petitioner has shown that he was convicted by the Court upon "No Evidence" and during trial established a reasonable doubt of his guilt.

It is clear that in the absence of a direct association of the odor of alcohol with the defendant, there is no evidence upon which the rest of the facts could rise as a sufficient basis to support a conviction of driving while intoxicated.



Sutherland v. Commonwealth, 171 Va. 485,
198 S.E. 2d 452

"Thus, it is established that in order to convict of crime it is necessary that 'the State establish by the evidence, without which there can be no conviction.' all of the elements of the offense charged, and the law permits nothing but legal evidence ... It is frequently stated that 'substantial' evidence is required; and it has been said that to sustain a finding of guilt, there must be more than a scintilla of evidence thereof. * * *

The presumption of innocence which runs in favor of one accused of crime is one of the most familiar presumptions known to the law. Merely to state the question whether there can be a conviction of crime when the prosecution has introduced no evidence is to raise the corollary question whether such a conviction would not, in effect nullify the presumption of innocence. ... The presumption of innocence must be overcome by evidence.

"... the defense in a criminal case, being a general denial of the crime charged, necessarily imposes on the government or state the burden of showing affirmatively by proof beyond a reasonable doubt the existence of every material fact or ingredient which the law requires, and a reasonable doubt of an accused's guilt of the crime charged, and hence grounds for his acquittal, may arise not only from



the evidence presented, but also from a want of evidence. Hence, nonaction of the defendant in a criminal case cannot be substituted for action on the part of the state as to any matter required to be established as a part of the states's case." 80 ALR 2d 1367-1369

* * *

"The idea of fairness is inherent in the requirement of due process of law. It is settled that due process is denied an accused where he is deprived of that fundamental fairness which is essential to the very concept of justice. Thus, the due process guaranty bars unfair use of evidence. 80 ALR 2d 1373

There is convincing evidence of the defendant's innocence. (1) His statement "that he was not intoxicated" (Appendix A, P.11,L.4- 5) (Appendix B, P.10,L.10-11); (2) Plea of Not Guilty; (3) His "speech was slow, but * * *, it was not slurred" (Appendix A, p.11,l.10, Appendix L)

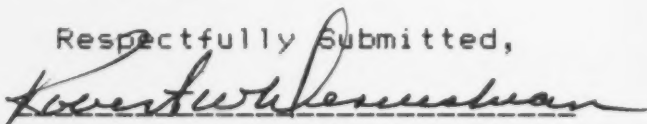
There is a definite 'want' of evidence which is beneficial and proof of innocence (1) no evidence that the defendant was unable to control the operation of his automobile; (2) no

evidence of belligerence, or hostility;
(3) no evidence of being argumentative or
not cooperative; (4) no evidence of
flushed face, disheveled clothing, or
confusion; (5) no evidence directly
associating the "odor of alcohol" with
the defendant's person or his breath; (6)
no evidence that alcohol caused the
accused to "stumble", (7) no evidence of
alcohol in the defendant's body.

CONCLUSION

For the foregoing reasons, the Writ
of Certiorari should be granted and the
decision below reversed.

Respectfully Submitted,


Robert W. Dervishian, pro se

Robert W. Dervishian
600 N. Boulevard
Richmond, Virginia 23220
(804) 355-2121

October 29, 1986



APPENDIX

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SUPREME COURT ORDERS

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING IN
THE CITY OF RICHMOND ON FRIDAY THE
5TH DAY OF SEPTEMBER, 1986.

Robert Wesley Dervishian Appellant,
against Record No. 850853
 Court of Appeals Nos. 0100-84
 0101-84

Commonwealth of Virginia Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside judgement rendered herein on the 24th day of July, 1986, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy Test:

Clerk



APPENDIX 2 (1) - COURT OF APPEALS ORDERS
VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA ON
MONDAY THE 3RD DAY OF JUNE, 1985.

Robert Wesley Dervishian Appellant,
against Record No. 0100-84 and 0101-84
 Circuit Court Nos. M-10-408 and
 M-10-409

Commonwealth of Virginia Appellee.

From the Circuit Court
of the City of Richmond

Before Judges Coleman, Barrow, and Duff

Upon review of the record in these
cases and consideration of the argument
submitted in support of and in opposition
to the granting of an appeal, the panel is
of opinion that the trial court properly
afforded the defendant an opportunity to
call for evidence in his favor and did not
deny him compulsory process, in conformity
with the requirements of Section 8,
Article I, Constitution of Virginia and
Amendment VI, Constitution of the United



States; and the defendants convictions had sufficient evidence to support them and they are not contrary to the law and the evidence nor did the proceeding in the trial court constitute a denial of due process of law.

Accordingly, the petition for appeal is denied.

A Copy Teste:

Clerk



APPENDIX 2 (2) - COURT OF APPEALS ORDERS
VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA ON
FRIDAY, THE 28TH DAY OF JUNE, 1985

Robert Wesley Dervishian Appellant,
against Record No. 0100-84 and 0101-84
 Circuit Court Nos. M-10-408 and
 M-10-409

Commonwealth of Virginia Appellee.

From the Circuit Court
of the City of Richmond

On consideration of the appellant's
motion, filed June 25, 1985, it appears to
the Court that the order entered herein
on June 3, 1985, was forwarded to the
circuit court prematurely.

Accordingly, it is ordered that
execution of the sentence imposed against
the appellant by the circuit court on
October 9, 1984 be, and is hereby, stayed
pending this Court's decision on the
appellant's petition for rehearing, filed



on June 20, 1985, and pending any appeal
filed by the appellant from this Court to
the Supreme Court of Virginia.

A Copy Teste:

Clerk



APPENDIX 3 (1) - CIRCUIT COURT ORDERS

IN THE CIRCUIT COURT OF THE CITY OF
RICHMOND, JOHN MARSHALL COURTS BUILDING
THE 20TH DAY OF AUGUST, 1984

COMMONWEALTH OF VIRGINIA

va. Appeal M-10-409

ROBERT WESLEY DERVISHIAN, Dft.

The defendant appeared and waived his right to have an attorney present to represent him in this case. J. S. Scot Pedin appeared on behalf of Commonwealth.

Being arraigned the defendant pleaded not guilty to operating a motor vehicle while under the influence of alcoholic beverages or other self-administered intoxicants or drugs, having been convicted of a like offense previously, as charged in the warrant in this appeal. With the consent of the accused, given in person, and the concurrence of the Court and the attorney for the Commonwealth, the Court proceeded to hear and determine this case

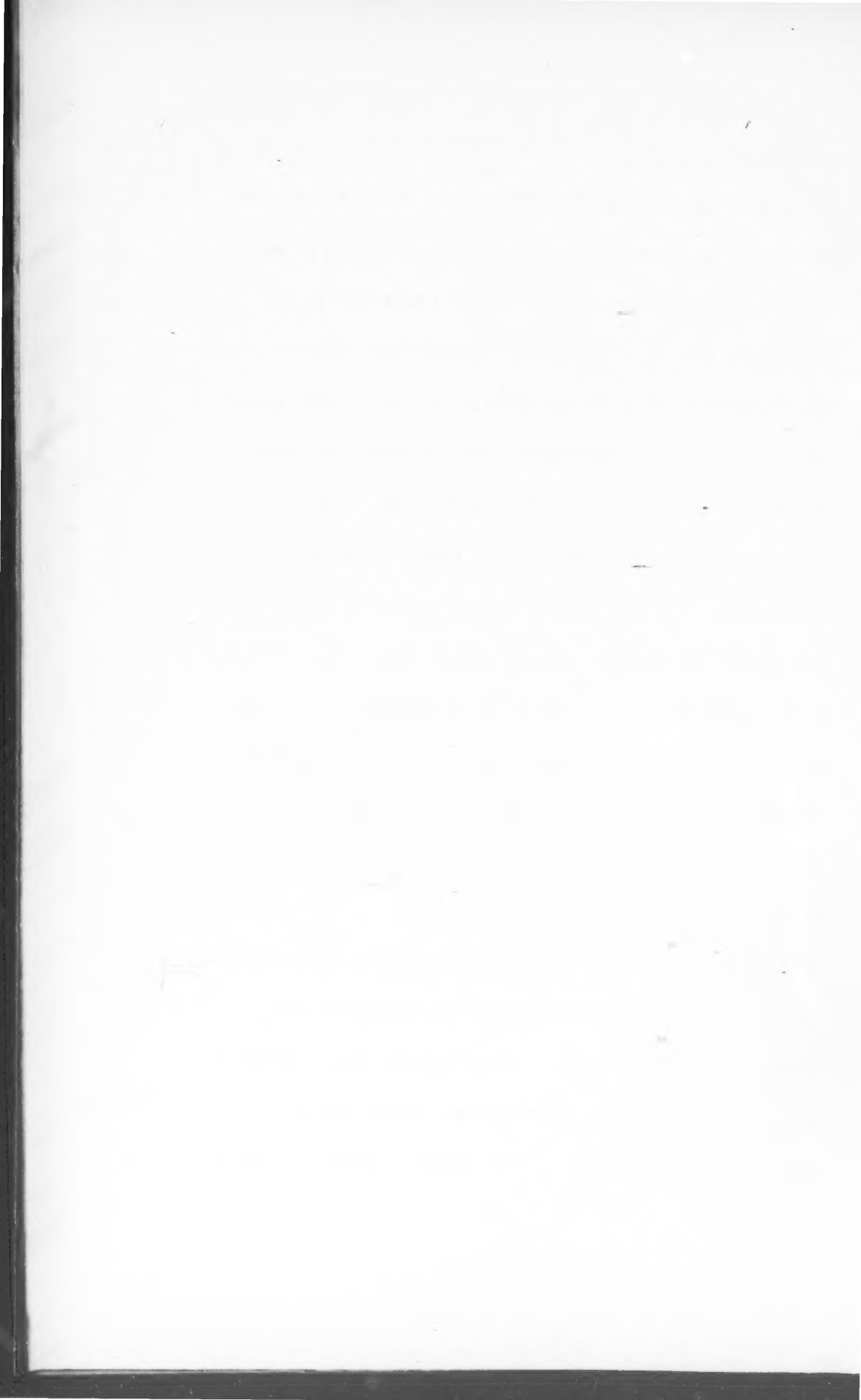


without a jury.

The defendant moved the Court to require the Commonwealth to make available to the defendant the tape recording of the hearing in the General District Court, and to require the Commonwealth to make available to the defendant the names of two persons who were released from the City lockup at the same time the defendant was released. The Court having duly considered said motions, same were denied. And the defendant noted his exception. The evidence of the Commonwealth having been presented, the defendant renewed his motions, which motions the Court denied. And the defendant noted an exception. And for reasons satisfactory to the Court, this case was continued to August 24, 1984, at 9:00 a.m. Thereupon the defendant was released to appear on said date.

August 20, 1984

A Copy Teste: Clerk



APPENDIX 3 (2) - CIRCUIT COURT ORDERS

IN THE CIRCUIT COURT OF THE CITY OF
RICHMOND, JOHN MARSHALL COURTS BUILDING
THE 24TH DAY OF AUGUST, 1984

COMMONWEALTH OF VIRGINIA

vs. Appeal M-10-409

ROBERT WESLEY DERVISHIAN, Dft.

The defendant appeared and J. S. Scot
Pedin appeared on behalf of Commonwealth.

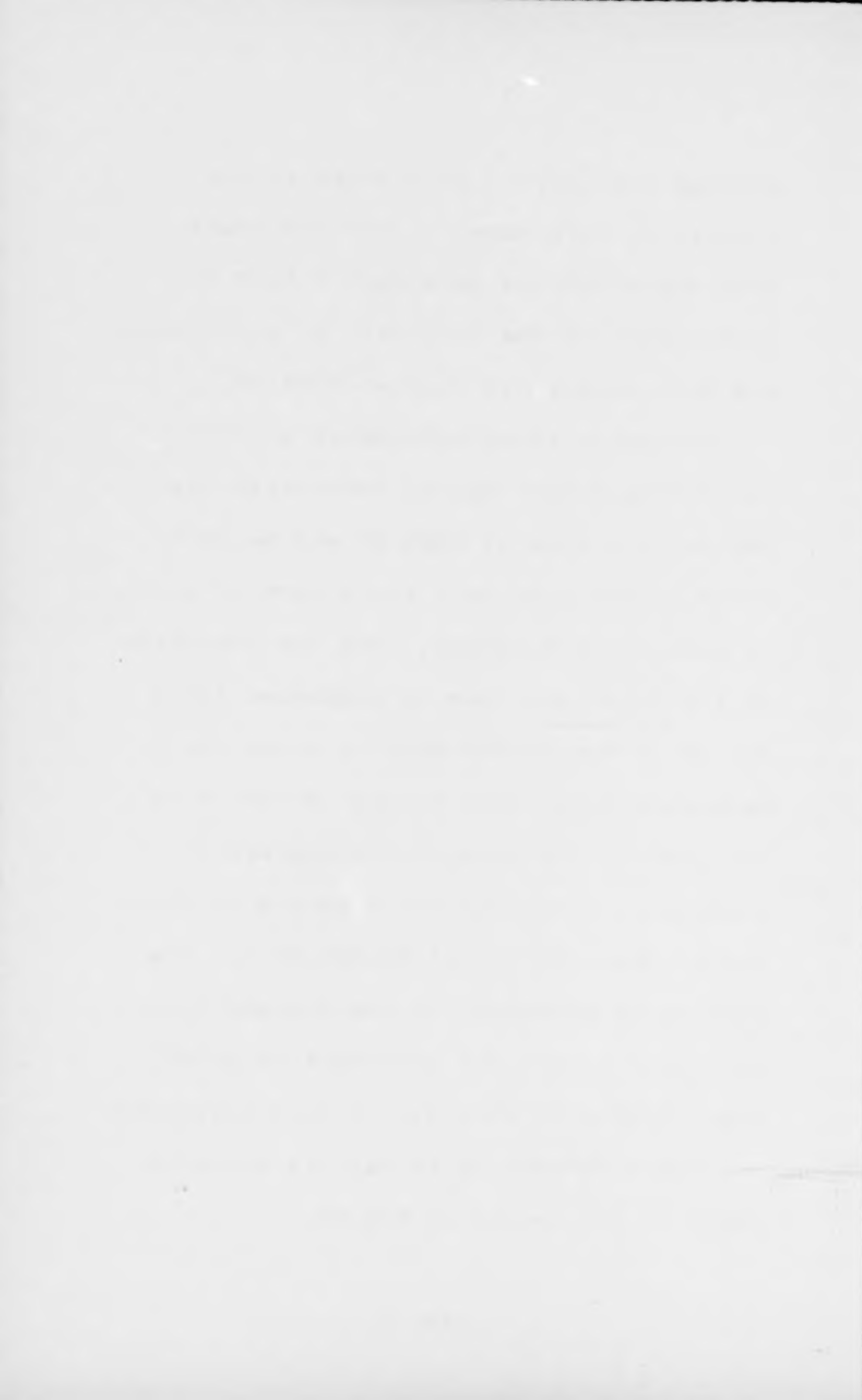
The evidence in this case having been
presented on August 20 ,1984 and said case
having been continued to this day, the
defendant this day moved the Court to
strike the evidence of the Commonwealth
as being insufficient for the finding of
a judgement of guilty, which motion the
Court denied and the defendant noted his
exception. And the Court finds the defend-
guilty of operating a motor vehicle while
under the influence of alcoholic beverages
or other self administered intoxicants or
drugs, having been convicted of a like



offense previously, as charged in the warrant in this appeal. And the Court doth ascertain the defendant's term of confinement in the City Jail at sixty days, and doth assess his fine at \$500.00.

Whereupon it is considered by the Court that Robert Wesley Dervishian pay and satisfy fine of \$500.00 and be confined in the City Jail for a term of sixty days in this appeal. And the execution of the said jail term is suspended for a period of twenty-one days to allow the defendant to produce further evidence to the Court. The defendant's operators license is suspended for a period of three years. Bond is set at \$1,500.00 for the purpose of an appeal to the Supreme Court of Virginia, and the defendant is given until 4:00 p.m. this day to post said bond.

The defendant is to pay his costs of Court in the amount of \$46.00.



And later this day with leave of Court the defendant entered into a recognizance in the sum of \$1,500.00 cash as surety therein, conditioned that if the said defendant shall abide by and perform the judgment of this Court in the event the Supreme Court of Virginia shall refuse to grant him a writ of error and supersedeas, or if granted it be later dismissed and appear before this Court on October 24, 1984, and in the meantime shall keep the peace, and be of good behavior and violate none of the laws of this Commonwealth, then the said recognizance to become null and void, else to remain in full force and effect.

Thereupon the defendant was released on bond, to appear before this Court on October 24, 1984 to renew said bond.

August 24, 1984

A Copy Teste: Clerk

APPENDIX 3 (3) - CIRCUIT COURT ORDERS

IN THE CIRCUIT COURT OF THE CITY OF
RICHMOND, JOHN MARSHALL COURTS BUILDING
THE 9TH DAY OF OCTOBER, 1984

COMMONWEALTH OF VIRGINIA

vs. Appeal M-10-408; M-10-409

ROBERT WESLEY DERVISHIAN, Dft.

The defendant appeared and J. S. Scot
Pedin appeared on behalf of Commonwealth.

Sentencing in these cases having been
set aside on September 12, 1984 and said
cases having been continued to this day,
the defendant renewed his motion to strike
the Commonwealth's evidence, which motion
the Court denied and the defendant noted
and exception. The defendant then moved
the Court to dismiss these cases, which
motion the Court denied and the defendant
noted an exception. And the Court now
finds the defendant guilty of refusing a
blood and breath test as charged in the
warrant in Appeal M-10-408, and finds him



guilty of operating a motor vehicle while under the influence of alcoholic beverages after having been previously convicted of a similar offense as charged in the warrant in Appeal M-10-409. And the Court doth ascertain sentencing in these cases as follows:

Appeal M-10-408 - operators license suspended for ninety days; and Appeal M-10-409 - fine of \$500.00; sixty days in jail with fifty days suspended during good behavior; operator's license suspended for three years.

Whereupon it is considered by the Court that Robert Wesley Dervishian pay and satisfy a fine of \$500.00 in Appeal M-10-408, and that he be confined in the City Jail for a term of sixty days in said case. And the Court doth suspend the execution of fifty days of the said sixty day term during the defendant's good be-



havior. And the defendant's operator's license is suspended for a period of ninety days in Appeal M-10-408, and for a period of three years in Appeal M-10-409. He is to pay his costs of Court, said fine and costs of Court totaling \$591.00.

And an appeal bond having been previously posted herein on August 24, 1984, the Court doth suspend the execution of the jail term imposed this day pending an appeal of these cases.

Thereupon the defendant was released.
October 9, 1984 A Copy Teste: Clerk

APPENDIX 6 - JURISDICTION ESTABLISHED

On July 20, 1984, at trial, in the General District Court, your petitioner's motion for access to the names of the two persons released with him and known by the Commonwealth was denied (Appendix A, p. 3-6) and he noted his appeal and was denied his motion for access to the tape recording of the proceedings. On August 6, 1984, he was refused the opportunity to set his motions (Appendix F) to be heard prior to trial on appeal at the docket call in the Circuit Court of the City of Richmond, and at trial his motion for access to the District Court tape recording and witnesses (Appendix F), Appendix B, p. 5, l. 16-22) (Appendix 3 [1]) was denied and he renewed his Motion (Appendix B, p. 10, l. 14-20, Appendix B, p. 13, l. 12-16) (Appendix 3 [1]) and objections and exceptions.

THE UNIVERSITY OF CHICAGO

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August 24, 1984, further proceedings were held and Judge Wilkinson denied the defendant's Motion (Appendix F) and to Strike and to Dismiss (Appendix 3[2]) and the defendant argued his cases and noted his objection and exceptions (Appendix 3[2]) on the following grounds (Appendix C) (Appendix L) (Appendix 7):

1. That a trial justice has a duty to acquit as well as convict upon the evidence
 2. That a defendant has a right to gather evidence in his own defense.
 3. That a defendant is entitled to review the records of a lower court to prepare for trial.
 4. That the defendant is entitled to have access to tape recordings made in the lower court to prepare for trial, in that the police officer changed his testimony,
- (A) No evidence that the "moderate odor of alcohol" came from the defendant, (B)

No evidence of slurred speech, (C) the defendant's denial of intoxication at the arrest.

5. That the Commonwealth failed to prove it's case, (A) there was no evidence that the odor of alcohol came from the defendant; (B) No evidence that the odor of alcohol came from the defendant; (C) the defendant stumbled as opposed to losing his balance; (D) denial of intoxication as part of the arrest; and was without evidence to support it.

6. The defendant was denied the opportunity to gather evidence in his defense.

7. The defendant was denied the opportunity to call witnesses on his behalf.

8. All of which violates the defendant's protections under the Constitution of Virginia and the Constitution of the United States and its amendments. (App.C) and appealed (Appendix 3[3]) to Court of

Appeals of Virginia, raising (Question I and II, herein) as Question I, "Was the accused denied his constitutional guaranty to call for evidence in his favor in violation of VI Amendment, United States Constitution and Section 8, Article I, Constitution of Virginia thereby denying him due process of law?" and (Question III, herein) as Question II, "Is the conviction of the defendant contrary to the law and evidence and without evidence to support it, in violation of the Constitution of the United States, and the Constitution of Virginia, thereby denying him due process of law?" and the Court of Appeals denied relief (Appendix 2[1]).

Then, the Court of Appeals, by order, (Appendix 2[2]) established in the record collateral issues the defendant attempted to reach in his then Question I (not easily seen on the record before that

time).

And pursuant to Rule 5:21 of the Supreme Court of Virginia, your Petitioner on appeal to the Supreme Court of Virginia raised (Question I, herein) as Question I "Was the accused denied his constitutional guaranty to call for evidence in his favor in violation VI Amendment, United States Constitution and Section 8, Article I, Constitution of Virginia thereby denying him due process of law?); and pursuant to Rule 5:21 of the Supreme Court of Virginia, in relevant part,

"... Where appeal is taken from a judgement of the Court of Appeals, only assignments of error relating to questions presented in the Court of Appeals, and assignments of error relating to action of the Court of Appeals, may be included in the petition for appeal to this [Virginia Supreme] Court."

and pursuant to the action of transmittal of the "premature" copy (Appendix 2[2]) to the Circuit Court and its issuance of

the Capias of June 13, 1985, your petitioner raised (Question II, herein) as Question II, "Was the accused denied his constitutional guaranty to prepare his defense in violation of XIV Amendment, Constitution of the United States, and Article I, Section 8, of the Constitution of Virginia, thereby denying him due process of law?"; and raised (Question III, herein) as Question III, "Is the conviction of the defendant contrary to the law and evidence and without evidence to support it, in violation of the Constitution of the United States, and the Constitution of Virginia, thereby denying him due process of law?".

APPENDIX 7 - TIME AND MANNER (REFUSAL)

On August 24, 1984, upon entry of judgement on violation of Virginia Code, 18.2-266 (Driving under the influence of alcoholic beverages), the your appellant,

was arraigned upon the charge of violation of Virginia Code, 18.2-268 (Refusal to submit to the taking of a sample of his blood or breath to determine alcoholic content) and the defendant entered a Plea of Not Guilty, whereupon the Commonwealth and the Defendant, stipulated the facts to be the same as upon the other case. The Court inquired as to the defendant's defense in this case and after the defendant indicated that he would defend upon the grounds (1) that the testing devices are unreliable; (2) that contact with the testing devices would expose him to harmful chemicals and diseases, (A) may inhale some foreign agent into his lungs in the breath test, and (B) may be injected with some foreign agent into his body with the blood test; and (3) that all including the aforesaid violates his constitutional rights; then the Court

entered judgement of conviction and suspended execution of judgements pending appeal and set bond on both charges at \$1,500.00. On September 12, 1984, the Court also set aside this judgement and continued it to October 9, 1984

On October 9, 1984, further proceedings were held for sentencing at which time the defendant moved the Court to take judicial notice of a news letter commonly distributed among attorneys which he offered as an exhibit, and it was refused by the Court and marked "Refused Defendant's Exhibit A" (Appendix K) and the Court entered judgement against the defendant, and the defendant noted his objection and appeal and execution of judgement pending appeal was also suspended. Your appellant, adopts the same Questions Presented, Facts, and Arguments in this case.

The following are incorporated by reference, it being necessary to a clear understanding of the Petition for Writ of Certiorari, but too voluminous to include and comply with the space requirements of the Rules of the Supreme Court of the United States.

Appendix A - See, Defendant's Exhibit # 1
General District Court
Transcript of July 20, 1984

Appendix B - See, Circuit Court Transcript
of August 20, 1984

Appendix C - See Court Reporter's Letter
of December 6, 1984 regarding
Circuit Court Transcript of
August 24, 1984

Appendix D - See, Circuit Court Transcript
of September 12, 1984

Appendix E - See, Circuit Court Transcript
of October 9, 1984

- Appendix F - See, Defendant's Motion for
access to tape recording and
witnesses, filed 8/20/84
- Appendix G - See, Defendant's Motion to
Set Aside, filed 9/12/84
- Appendix H - See, Subpoena Duces Tecum
- Appendix I - See, Commonwealth's Motion
to Quash Subpoena Duces Tecum
- Appendix K - See, Defendant's Exhibit # A
refused, 10/9/84 (Refusal Case)
- Appendix L - See, Defendant's Notice of
Objection to Transcript
Pursuant to Rule 5A:8,
filed, 12/20/84